SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 10

26 May 2014

RUSSIAN TEXT OF ARTICLE 26(4)(c) OF THE ENERGY CHARTER TREATY:
Reference to the Arbitration Institute of the Stockholm Chamber of Commerce?

INTRODUCTION

1. In the *Stati* case,[1] the Republic of Kazakhstan contested the Tribunal's jurisdiction on several grounds, including that the Russian text of Article 26(4)(c) the Energy Charter Treaty (ECT) does not specifically refer to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[2] This note examines this particular issue by providing a brief analysis of Article 26(4)(c) of the ECT: in particular, it compares the English and Russian text; summarises the parties' submissions and the Tribunal's decision in the *Stati* case; and, finally, this note summarises the rules of interpretation applicable to the issue at hand.

[1] Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra Raf Trans Traiding Ltd. v Republic of Kazakhstan, SCC Arbitration V (116/2010), Award, 19 December 2013. Available at www.italaw.com/sites/default/files/case-documents/italaw3083.pdf See also news article on 18 February 2014 by Investment Arbitration Reporter: www.iareporter.com/articles/20140218

[2] See *Stati* Award, paragraphs 697-704.

THE ENGLISH AND RUSSIAN TEXTS COMPARED

2. In order to identify the source of Kazakhstan's jurisdictional objection, it is appropriate to reproduce, the relevant part of Article 26(4) in both its English and Russian versions:

> a. (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
>
> (a) [ICSID]
> (b) [UNCITRAL]; or
> **(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.**[3]
>
> b. (4) Если какой-либо Инвестор предпочитает передать спор на разрешение в соответствии с подпунктом (2)(c), этот Инвестор также дает свое согласие в письменной форме на передачу спора на рассмотрение:
>
> a. [ИКСИД]
> b. [ЮНСИТРАЛ]; или
> **c. на арбитражное рассмотрение при Арбитражном институте международной торговой палаты в Стокгольме.**[4]

3. Two differences are immediately noticeable in the Russian text relative to the English one (i) the word "международный" ("international") appears in the Russian version but not in the English text, and (ii) the phrase "в Стокгольме" ("in Stockholm") may be read in the Russian version as an indication of a geographical location (place) rather than as part of an institution's title.

THE DESIGNATION OF THE SCC

4. It may be interesting to note (and this could be the historical source of the confusion) that the SCC has not been consistent in the way it refers to itself in the Russian language. Three instances of such inconsistency may be pointed out: "Арбитражный институт Торговой палаты Стокгольма" ("Arbitration institute of the chamber of commerce of Stockholm"); "Арбитражный институт Торговой палаты г. Стокгольма" ("Arbitration institute of the Chamber of Commerce of the City of Stockholm"); "Арбитражный институт при Торговой палате г. Стокгольма" ("Arbitration institute at the Chamber of Commerce of the City of Stockholm). In contrast, however, the

[3] Emphasis added.
[4] Emphasis added.

designation in English has been invariably constant: "The Arbitration Institute of the Stockholm Chamber of Commerce".[5]

5. The above inconsistencies in the way the SCC has been designated in the Russian language may have had an impact on the references to the SCC in bilateral investment treaties (BIT) concluded by Kazakhstan. Thus references have been made to:

    a. "the Arbitration Institute of the Chamber of Commerce in Stockholm"[6]

    b. "International Arbitration Institution of the Chambre *[sic]* of Commerce in Stockholm".[7]

ARTICLE 26(4)(C) IN THE *STATI* CASE

6. One of the jurisdictional objections presented by Kazakhstan in the *Stati* case was that the Russian text of Article 26(4)(c) of the ECT does not refer to the SCC. As a result, the Tribunal should decline jurisdiction. The parties' submissions on this particular issue may be summarised as follows.

7. According to Kazakhstan, Kazakhstan and Moldova[8] assumed obligations under the ECT on the basis of the Russian language text. The Russian version of the ECT refers *"to an arbitral proceeding under the Arbitration institute of the international chamber of commerce in Stockholm"*. Consequently, Kazakhstan claimed that, among other things:[9]

    a. *"the Arbitration institute of the international chamber of commerce"*: the intention was to provide for arbitration under the auspices of the International Court of Arbitration of the International Chamber of Commerce (ICC); and

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[5] See Russian and English versions of the Arbitration Rules of the SCC 1999, 2007 and 2010 at www.sccinstitute.com Copies of the Arbitration Rules of the SCC 1976 and 1988 were kindly provided by the SCC upon request by MENA Chambers.

[6] Agreement between the Government of the Republic of Kazakhstan, on the One Hand and the Belgo-Luxemburg Economic Union, on the Other Hand on the Reciprocal Promotion and Protection of Investments, 16 April 1998. http://unctad.org/sections/dite/iia/docs/bits/kazak_belgo_lux.pdf Additionally, it is worth mentioning that, in the BIT with the Belgo-Luxemburg Economic Union, Kazakhstan does distinguish between the ICC (referring to "the Arbitral Court of the International Chamber of Commerce in Paris") and the SCC (referring to "the Arbitration Institute of the Chamber of Commerce in Stockholm").

[7] Agreement between the Government of Arab Republic of Egypt and the Government of Kazakhstan on Promotion and Protection of Investment, 14 February 1993. http://unctad.org/sections/dite/iia/docs/bits/egypt_kazakhstan.pdf See also BIT between Italy and Kazakhstan (referring to "Arbitration Institute of the Stockholm Chamber", in Italian), 22 September 1994. http://unctad.org/sections/dite/iia/docs/bits/italy_kazakhstan_it.pdf

[8] Anatolie and Gabriel Stati are both citizens of Moldova (a Contracting Party to the ECT) and, therefore, Investors according to Article 1(7) of the ECT.

[9] *Stati* Award, *loc. cit.*

b. *"in Stockholm"*: the intention was to provide for the geographical location where the dispute would be resolved.

8. The Claimants rejected the Respondent's analysis on several grounds, including:[10]

   a. "There is no support for Respondent's argument that the capital *"A"* in *"Arbitration institute"* refers to the International Court of Arbitration of the ICC, and support to the contrary is found on the official Russian language website of the ECT."

   b. "[t]he words *"in Stockholm"* do not denote a seat and point out that references to arbitral seats are notably absent in the other arbitration options in Art. 26(4) ECT."

   c. "[a]ll other authentic versions of the ECT clearly refer to the Arbitration Institute of the SCC as the forum. The Russian-speaking Contracting Parties to the ECT understood this. This is sufficient for the Tribunal to find that the SCC is the proper forum."

   d. "[e]ven if the Respondent's translation arguments are correct, the Russian ECT must be interpreted in conformity with the five others."

9. The arbitral tribunal concluded that it had jurisdiction because:[11]

   a. "First, the Tribunal is not persuaded by the Respondent's linguistic analysis of the Russian text of the provision, as the states ratifying the ECT were aware of the texts in the other languages referring to the SCC and not objecting thereto or to the respective publications of the ECT Secretariat."

   b. "[…] second, even if Respondent's translation arguments were correct, the Russian ECT must be interpreted in conformity with the five others under the rule of treaty unity."

   c. "Respondent has not provided any evidence that the Russian text was intended to provide a different meaning regarding the jurisdiction."

10. It is worth noting that Professor Sergei Nikolayevich Lebedev (Co-Arbitrator) *"dissent[ed] with regard to Section H.I. of the Award"*. "Section H.I. Jurisdiction" of the *Stati* Award deals in part with "the Parties' Consent to Arbitration before the SCC". However, it is not possible to ascertain whether or not Professor Lebedev's dissent was in relation to the specific issue under examination in this note.

INTERPRETATION OF ARTICLE 26(4)(C) OF THE ECT

[10] *Stati* Award, *op. cit.*, paragraphs 691-696.
[11] *Ibid.*, paragraphs 705-709.

11. Article 50 (Authentic Texts) of the ECT stipulates that:

> In witness whereof the undersigned, being duly authorized to that effect, have signed this Treaty in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic.

12. The Russian text is consistent apart from the fact that the languages are listed in the alphabetic order of the Russian language – Статья 50 (Аутентичные тексты):

> В удостоверение чего нижеподписавшиеся, должным образом на то уполномоченные, подписали настоящий Договор на английском, испанском, итальянском, немецком, русском и французском языках, тексты которого на всех языках являются равно аутентичными, в одном подлинном экземпляре, который будет сдан на хранение Правительству Португальской Республики.

13. Article 50 of the ECT is consistent with *Article 33: Interpretation of treaties authenticated in two or more languages* of the Vienna Convention on the Law of Treaties 1969 (VCLT):[12]

    a. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

    b. […]

    c. The terms of the treaty are presumed to have the same meaning in each authentic text.

    d. […] **when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.**[13]

14. It is to be recalled that "the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term."[14] It is also to be recalled that Article 33 VCLT and, particularly, its paragraphs 3 and 4 provide for the method, which should be adopted in order to ascertain what the parties intended if the text of one of the authentic languages of a treaty is different from the other text(s).

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[12] Accession to the VCLT by Moldova took place on 26 January 1993 and by Kazakhstan on 05 January 1994.
[13] Emphasis added. For more information, please see *The Process Involved in Interpreting a Treaty; With special reference to the Energy Charter Treaty*, Note 3, Series of Notes on the Energy Charter Treaty, 10 March 2014. Available at www.menachambers.com/expertise/energy-charter-treaty/
[14] *Draft Articles on the Law of Treaties with commentaries*, Yearbook of the International Law Commission, 1966, vol. II, page 225, paragraph (7).

15. The starting point of the methodology set out in Article 33 VCLT is the assumption that the terms of a treaty have the same meaning in each authentic text. In addition, Article 33(4) of the VCLT directs the interpreter to adopt "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty…".

16. As the International Law Commission observed, "… equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation."[15]

17. It seems reasonable to suggest that the intention of the Contracting Parties to the ECT, including those who only spoke Russian, is clear from the other five authentic texts of the ECT. Perhaps, one "plausible" translation of the Russian text of Article 26(4)(c) may be "an arbitral proceeding under the Arbitration institute of the international chamber of commerce in Stockholm" as submitted by Kazakhstan in the *Stati* case (see paragraph 8 above).[16] However, this would be a literal translation without any context and ignoring the intentions. Moreover, the possibility of submitting a dispute between an Investor and a Contracting Party to the SCC was introduced into the ECT draft texts early on in the negotiations. There was no disagreement regarding the submission of disputes to the SCC, except for a single query.[17] The query was whether the SCC is opened to all interested parties. In response, Sweden issued a statement which read as follows:

> S *[Sweden]* wishes to emphasize that arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce are indeed open to any interested party, and the Institute is actually one of the most used for disputes between Western countries and the former Soviet republics. A recent agreement between Russia and USA renewed the role of the Stockholm Institute as administrator of arbitral proceedings.[18]

18. The negotiators with no further discussion accepted the clarification,[19] and no other discussion or clarifications were sought after that. The availability of the SCC as a venue for settling

[15] *Ibid.*
[16] See *Stati* Award, paragraph 698.
[17] Room Document 5, Working Group II, 30 March 1993, page 6. Annex 1.
[18] Room Document 5, Working Group II, 23 April 1993. Annex 2.
[19] Room Document 4, Plenary Session, 24 April 1993, pages 4 and 7. Annex 3.

disputes between an Investor and a Contracting Party was accepted in the form it was initially proposed.

19. In addition, it may be argued that the discrepancy between the Russian text and the other authentic texts of the Treaty is of a technical or editorial nature and thus should be ignored and preference should be given to what the Contracting Parties clearly intended. As Oppenheim observed, "[i]f one language text differs from others because of an editorial oversight, it may be disregarded."[20]

20. The argument of an editorial oversight is further supported by ECT's *travaux préparatoires*. As the ECT's draft of 1992 refers to "an arbitral proceedings *[sic]* under the International Chamber of Commerce, Stockholm"[21], the draft of 1994 indicates the SCC mirroring Article 26(4)(c) of the ECT.[22]

CONCLUSION

21. The Russian translation of the English text of Article 26(4)(c) is inaccurate. The alleged inconsistency between the Russian text and all the other authentic texts of this particular provision must not bear on the issue of consent to arbitrate. The problem raised by the inaccuracy of the translation (or the inconsistency between the English and the Russian texts) is one of interpretation, as explained above. Therefore, this particular interpretive issue should not be raised any more. It is a non-issue. And raising it or any other frivolous objections would no doubt be a waste of time and money.[23]

[20] *Oppenheim's International Law* (edited by Sir Robert Jennings and Sir Arthur Watts), Ninth Edition, Volume I, 1996, page 1283, footnote 3.
[21] Basic Agreement for the European Energy Charter, 22/92 BA 12, 09 April 1992, page 62. Annex 4.
[22] Energy Charter Treaty, Interim Text, 20 June 1994, page 41. Annex 5.
[23] For an attempt by Kazakhstan to set aside the *Stati* Award, please see news article on 23 May 2014 by Investment Arbitration Reporter: www.iareporter.com/articles/20140523_2
Additionally, see Note 9: Does the ECT apply to Gibraltar?: www.menachambers.com/expertise/energy-charter-treaty/

ANNEX 1

30.5 : N suggests that the chapeau of para (4) should be amended to read: "Pursuant to paragraphs (1) to (3), the dispute may be submitted to:".
A new sub-paragraph should be included in para (4):
"In the event that the parties to a dispute governed by the rules of this Article are not within a period of three months from the expiry of the time period referred to in paragraph (2) above able to agree on the form for dispute settlement pursuant to the rules in paragraph 4 (a) to (c), paragraph 4(a)(i) shall apply to Contracting Parties being parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, and paragraph 4(a)(ii) to Contracting Parties not being parties to the said Convention."

30.6 : The paragraph will be deleted if non-members of the Stockholm Chamber of Commerce are precluded therefrom.

30.7 : N asks for deletion of this para.

30.8 : N asks for deletion of para (6)(a).

30.9 : N wants to establish more precise rules or guidelines concerning the tribunal's decisions.

30.10 : CDN will reconsider its suggestion to include following additional paragraph:
"A tribunal may order, or recommend, an interim measure of protection to preserve the rights of a disputing party, or to ensure that a tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order, or recommend, attachment of assets or order, or recommend, that a measure alleged to constitute a breach of an obligation in Part III of this Agreement be enjoined."

30.11 : Legal Sub-Group was asked to consider whether the paragraph is needed to achieve the objective, which is to allow an Investor to have recourse to dispute settlement on behalf of a company

ANNEX 2

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

Room Document 5
WG II, 22-23 April 1993

Brussels, 23 April 1993

Article 30 - Settlement of Disputes between an Investor and a Contracting Party.

S wishes to emphasize that arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce are indeed open to any interested party, and the Institute is actually one of the most used for disputes between Western countries and the former Soviet republics. A recent agreement between Russia and USA renewed the role of the Stockholm Institute as administrator of arbitral proceedings.

S therefore wishes to retain paragraph 3(c) of Article 30.

CHARTER CONFERENCE SECRETARIAT
c/o CEC - DG XVII, rue de la Loi 200, 1049 Brussels, Belgium
Tel: (32-2-) 295 7873. Fax: (32-2-) 296 6261

ANNEX 3

OR

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

OR

[(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce;][9]

[(5) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.][10]

(6) [(a) The consent given in paragraph (5), together with the consent given under paragraph (3), shall satisfy the requirements for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; and

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, done at New York, 10 June, 1958 ("New York Convention").][11]

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a State that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article 1 of that Convention.

N also suggests that a new sub-paragraph should be included in para (4):
"In the event that the parties to a dispute governed by the rules of this Article are not within a period of three months from the expiry of the time period referred to in paragraph (2) above able to agree on the form for dispute settlement pursuant to the rules in paragraph 4 (a) to (c), paragraph 4(a)(i) shall apply to Contracting Parties being parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, and paragraph 4(a)(ii) to Contracting Parties not being parties to the said Convention."

30.8 : EC suggests substitution with : "In this case, the investor may further choose in writing for the dispute to be submitted to:".

30.9 : It has been established that arbitral proceedings under the Stockholm Chamber of Commerce are open to any interested party. J scrutiny reserve.

30.10: N asks for deletion of this paragraph. Alternatively that it is made optional or allow for reservation. Referred to Plenary.

30.11: N asks for deletion of paragraph (6)(a). Consequential to footnote 30.10. Referred to Plenary.

30.12: N wants to establish more precise rules or guidelines concerning the tribunal's decisions.

30.13: EC suggests addition of the underlined words or deletion of the paragraph:
"A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement, applicable rules and principles of international law and any other provisions applicable in a case before it."

ANNEX 4

(5) In case the Contracting Party concerned is not or has not yet become a Contracting State of the Convention referred to in paragraph (3), the dispute may, at the choice of the investor concerned, be submitted to:

(a) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in paragraph (3) under the rules governing the Additional Facility for the Administration of Proceedings by the secretariat of the Centre (Additional Facility Rules); or

(b) an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(c) an arbitral proceedings under the International Chamber of Commerce, Stockholm; or

(d) an international arbitrator or ad hoc arbitration tribunal appointed by a special agreement.

In the event that the dispute is submitted to an internaional arbitrator or ad hoc arbitration tribunal in accordance with subparagraph (d) above and no agreement on the appointment of that international arbitrator or ad hoc arbitration tribunal has been reached within sixty days of the submission of this dispute, the investor may submit the dispute to (a), (b) or (c) above.

(6) [A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by investors of another Contracting Party shall for the purpose of article 25 (2)(b) of the Convention referred to in paragraph (5)(a) above be treated as an investor of that other Contracting Party][3][4].

(7) [Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article][5].

ANNEX 5

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June, 1958 ("New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of aricle 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article 1 of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the written request referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".